BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between	
[redacted]	Record of Proceedings
Charged Employee	FSGB No. 2012-057
and	December 2, 2015
Office of the Inspector General United States Agency for International Development	**ORDER: Motion for Additional Discovery and to Compel Discovery Responses**

For the Foreign Service Grievance Board:	
Presiding Member:	Susan R. Winfield
Board Members:	William J. Hudson
	Nancy M. Serpa
Special Assistant	Joseph J. Pastic
Representative for the Charged Employee:	Daniel S. Crowley, Associate Hannon Law Group
Representative for the Office of the Inspector General:	Lisa Goldfluss Legal Counsel to the Inspector General
Employee Exclusive Representative:	American Foreign Service Association

ORDER: Motion for Additional Discovery and to Compel Discovery Responses

I. THE ISSUES

This order addresses two motions filed by [redacted] (charged employee, employee): a Motion for Additional Discovery, on June 30, 2015, and a Motion to Compel Discovery, on August 3, 2015.

II. BACKGROUND

[redacted], was employed by the United States Agency for International Development in the Office of the Inspector General (USAID OIG, agency) as a financial auditor in [redacted] from 2009 to 2011. During that time, she was assigned, *inter alia*, to audit two USAID programs (a [redacted] HIV/AIDs program in 2010 and a [redacted] Family Planning/Contraceptives program in 2011). The charged employee stated that she was prepared to make negative findings about both programs, alleging a waste of $120 million and $100 thousand dollars in each program, respectively. The OIG responded that the employee's audit manager, [redacted], and the Regional Inspector General, [redacted], overruled her negative findings on grounds that they were erroneous and/or did not need to be included in the audit reports.[1]

On June 9, 2011, an anonymous or confidential complaint was delivered to the [redacted] USAID OIG office, stating that the charged employee was submitting partially false vouchers for two-way education transportation reimbursement, because her husband was driving the children to school in the mornings. [redacted], an investigator in [redacted] received the complaint and after consulting with an Assistant Special Agent in Charge in Washington, D.C.,

[1] The procedural posture of this grievance is that the Foreign Service Grievance Board (FSGB, Board) was preparing to make factual findings at the conclusion of the hearing in October 2014; however, these findings and a decision on the merits were held in abeyance when the charged employee sought to reinstate her whistleblower retaliation defense and to reopen discovery. Accordingly, we recite the facts as they have been reported by the parties, recognizing that some of the reported facts are disputed.

[redacted], arranged for a Regional Security Officer (RSO) to follow Mr. [redacted] in the mornings to confirm that he was driving the children to school. The investigator also requested copies of the education transportation vouchers that showed that Ms. [redacted] had requested reimbursement for the cost of transporting the children to and from school.

Several weeks later, Lisa McClennon, the Deputy Assistant IG for Investigations, traveled to [redacted] allegedly for a routine site visit. When she arrived and reviewed the pending investigations, she testified that she concluded that [redacted] investigation "had not progressed."[2] She took over the investigation, interviewed more than a dozen witnesses and requested a large number of financial documents that Ms. [redacted] had submitted for reimbursement. Ms. McClennon stated that when she reviewed the documents and interviewed the witnesses, she concluded that the employee had submitted a number of false vouchers for reimbursement of educational travel expenses, a number of requests for cost of living allowance (COLA) payments to which she was allegedly not entitled, and a request for larger housing to which she was also allegedly not entitled.

Ms. McClennon reported her findings to Mr. Carroll in Washington. He ordered Ms. [redacted] immediate curtailment, despite the fact that at that time she was away from post with her family. In addition, Mr. Carroll proposed to separate Ms. [redacted] from the Service for cause. After reviewing written and oral replies from the charged employee, Mr. Carroll recommended in a letter, dated August 3, 2012, that the employee be separated for cause.[3] Ms. [redacted]

[2] Ms. McClennon made this statement during her testimony at a hearing on July 31, 2014.

[3] The Board initially came to the conclusion that Mr. Carroll did not have authority to prosecute this matter because his term as Acting IG expired before he recommended Ms. [redacted] for separation. The case was then dismissed. However, in 2013, Mr. Carroll was nominated to be the IG for USAID. Thus, he again became the Acting IG, pursuant to the Federal Vacancy Reform Act (FVRA) of 1998, 5 U.S.C. § 3345 et seq. As Acting IG, Mr. Carroll ratified his earlier recommendation to separate Ms. [redacted] for cause and the grievance appeal was reinstated.

responded to the recommendation by arguing that the investigation and the resultant charges were retaliatory based on her status as a whistleblower when she attempted to report negative findings in the [redacted] and [redacted] audits.

During a telephonic pre-hearing conference and while discussing Ms. [redacted]' asserted whistleblower retaliation defense, the Board inquired whether the charged employee had any evidence that Mr. Carroll had personal knowledge of her alleged protected audit disclosures. When Ms. [redacted]' counsel answered in the negative, the Board questioned whether the employee could prove her whistleblower retaliation defense in the absence of proof that the deciding official had knowledge of her protected activities. Upon USAID OIG's request, the Board vacated the employee's scheduled depositions of [redacted] (Ms. [redacted]' audit manager) and [redacted] (the OIG investigator in [redacted] because their testimony reportedly only pertained to the whistleblower retaliation defense.[4] Both in her pre-hearing brief and at the start of the hearing, the employee's counsel formally withdrew the whistleblower retaliation defense.

The Board then held a hearing on the separation recommendation, beginning on July 28, 2014. Before the Board was able to issue a final order,[5] however, the employee filed a motion on November 14, 2014, advising the Board that Mr. Carroll had withdrawn his name from consideration for the position of IG and the President had formally withdrawn his name from consideration by Congress on November 12, 2014.[6] The motion sought leave to file a supplemental pleading and to reopen discovery based on newspaper articles that reported that

[4] At the same time, the Board expressly reserved for a decision at the start of the hearing, the motion of USAID OIG to dismiss the retaliation defense. In addition, the Board ordered that the two witnesses – [redacted] and [redacted] – should be made available at the employee's request for possible testimony at the hearing.

[5] The parties submitted post hearing briefs in October 2014.

[6] Mr. Carroll retired from the Foreign Service, effective December 31, 2014.

Mr. Carroll was accused by OIG auditors (not including Ms. [redacted] of putting pressure on them to modify audit reports in order to delete negative findings about USAID. In addition, the charged employee requested the opportunity to depose Mssrs. [redacted] and [redacted]

On April 27, 2015, this Board issued an order granting the request to reopen discovery, allowing Ms. [redacted] to depose Mssrs. [redacted] and [redacted] The Board's order also stated that, after completion of those depositions, the charged employee should advise this Board whether she wished to reinstate her whistleblower retaliation defense. Ms. [redacted] deposed the two witnesses in June 2015 and notified the Board on June 26, 2015, that she did wish to reinstate her whistleblower retaliation defense. On June 30, 2015, Ms. [redacted] filed the instant motion for additional discovery, seeking to take additional depositions and to obtain additional information from the agency. On August 3, 2015, she filed the instant motion to compel discovery, requesting an order from this Board compelling answers from Messrs. [redacted] and [redacted] to questions they had refused to answer, on advice of agency counsel, during their June depositions.

III. POSITIONS OF THE PARTIES AND RULINGS

The Board issues the following rulings on the motions before us:

A. MOTION FOR ADDITIONAL DISCOVERY

The charged employee makes the following requests for additional information:

Request #1: All documents, including correspondence, email, phone records, calendars, dates books, notebooks, and investigation files of both Ms. McClennon and Mr. [redacted] that contain information related to the investigation of [redacted].

The employee argues that the earliest she could have known about the "additional allegations" was when Ms. McClennon testified in her deposition on May 18, 2014. She claims that she did not move to compel production of these documents earlier because the "Board had limited her retaliation defense" before she knew there were other allegations to be investigated.

The agency counters that these documents are not newly discovered;[7] that Ms. [redacted] was certainly aware that Ms. McClennon and [redacted] conducted investigations into her conduct; and that she could have requested the investigation files during the initial discovery period, or moved to compel their disclosure prior to the hearing. The agency also contends that these additional discovery requests delay resolution of this case and require costly travel arrangements for the deponents. USAID OIG argues lastly that neither of the persons responsible for the investigation that led to the recommendation to separate the employee – Ms. McClennon and Mr. Carroll – had any knowledge of her alleged "protected" audit disclosures and neither had a retaliatory motive. According to the agency, the charged employee conceded in her deposition that Mr. [redacted] had no retaliatory motive against her.

RULING on Request #1:

The Board grants this request on the ground that the investigation files may contain material that would either be relevant to the retaliation defense, or might lead to the discovery of relevant information.[8] As we stated in our order granting the employee leave to file her pleading and to reopen discovery, the issues whether her efforts to disclose unfavorable audit information were protected whistleblower disclosures and whether they contributed to the decisions to investigate her voucher submissions and/or to recommend her separation are relevant to the whistleblower retaliation defense. And, although we disagree with the employee that the Board "limited" her retaliation defense, we nonetheless find that the requested files should be disclosed.

[7] Throughout its August 15, 2015, Consolidated Responses to the charged employee's motions, the agency repeatedly cites Section 1106(9) of the Foreign Service Act, as amended, in support of its contention that a motion to reopen discovery must present "newly discovered or previously unavailable" evidence. The Board notes that Section 1106(9) applies that standard to motions to reconsider its decisions, not to motions to reopen discovery.

[8] See the Board's Policies and Procedures at p. 8: "In general, only non-privileged information that is relevant and material to the issues presented in a grievance, or which may lead to discovery of relevant and material information, may be requested in discovery."

Request #2: Deposition of [redacted]

The participation of Ms. [redacted] a fellow OIG auditor, in discussions about the [redacted] audit arose in the deposition of Mr. [redacted] The charged employee claims that Ms. [redacted] can provide important testimony about whether the "wasted" contraceptives were actually discussed with the Mission, i.e., whether this issue was in fact raised in that audit's "exit conference."

The agency argues that the charged employee could easily have requested a deposition of Ms. [redacted] during the initial discovery phase, as she was aware of the latter's participation in the [redacted] audit and exit conference. USAID OIG contends that the order permitting discovery to be reopened should not include matters that could have been requested at the outset.

RULING on Request #2:

The Board denies this request. The charged employee knew that Ms. [redacted] assisted her with the [redacted] audit, shared her concerns about the program, and attended the "exit conference." If Ms. [redacted] thought that Ms. [redacted] had relevant information to offer, she could have, but did not, schedule her deposition at any time during the pre-hearing discovery period before she elected to withdraw her retaliation defense. We conclude, moreover, that the apparent purpose for the request to depose Ms. [redacted] at this time is to examine whether Mr. [redacted] was truthful when he asserted in his deposition that Ms. [redacted]' concerns were discussed during the exit conference at the conclusion of this audit. We are not persuaded that discovery driven by a desire to impeach a witness on a relatively tangential issue is a legitimate endeavor, particularly during reopened discovery that was requested more than a year after the hearing was completed.

Request #3: Deposition of [redacted]

Ms. [redacted] claims she was unaware that Mr. [redacted] was involved in any way in her investigation until the deposition of Mr. [redacted] was taken in June 2015. She now seeks to depose Mr. [redacted] about his involvement in the investigation.

The agency opposes this request on the ground that the charged employee could have learned that Mr. [redacted] was Mr. [redacted]'s immediate supervisor, may have had some involvement in the investigation, and could have sought his deposition much earlier.

RULING on Request #3:

The Board's decision to allow the charged employee to reinstate her whistleblower retaliation defense was not meant to signal that we are willing to re-open the hearing on the separation recommendation. Accordingly, we view a general deposition of Mr. [redacted] to be largely irrelevant to the whistleblower retaliation defense, except to the extent that he might provide information about his involvement in the investigation. Accordingly, we deny the request for this deposition; however, we order the agency to submit a declaration by Mr. [redacted] describing his involvement in the investigation, as well as his knowledge, if any, of Ms. [redacted]' audit disclosures.

Request #4: Copies of the entire TeamMate File for the [redacted] audit and for the [redacted] audit.

The employee argues that in initial discovery, she requested and received TeamMate files for both audits [redacted] and [redacted] but the documents produced for each audit were different. Despite the differences in what was produced, Ms. [redacted] did not request or move to compel any additional information. She now argues that she is requesting the entire files because "they contain draft documents, work papers, and correspondence related to each audit. She argues that "[i]f additional evidence [exists], this [the TeamMate file] is the most likely place to

find it." She lastly contends that she wants these files to test the credibility of Mr. [redacted] who testified that the TeamMate file "should include records showing that Ms. [redacted]' concerns were discussed with the Mission during the exit."

USAID OIG responds that it has already produced 1500 pages on the [redacted] program audit alone. The agency protests the time and effort required by additional discovery of any kind.

RULING on Request #4:

The Board denies this request. Notwithstanding the charged employee's claim that the TeamMate documents that were produced were not handed over to her until after the pre-hearing conference on May 7, 2014, she was specifically afforded the opportunity during the pre-hearing teleconference to file a motion to compel additional discovery if the need arose thereafter. She elected not do so. The fact that she may now regret that decision is not a compelling reason to reopen discovery. In addition, she seeks discovery of additional TeamMate documents in part to challenge the credibility of Mr. [redacted] who testified that her concerns about the [redacted] audit were discussed during the exit conference. As stated previously, this is not a legitimate reason for additional discovery under the circumstances presented here.

Request #5: The metadata associated with Mr. [redacted]'s November 15, 2010 memorandum memorializing his meeting with PEPFAR Regional Legal Adviser [redacted] confirming that the [redacted] HIV/AIDs program conditions were satisfied before the U.S. government released funds.

The charged employee argues that "a person accessing the TeamMate File from [an] OIG computer system" might be able to see "metadata" and determine when Mr. [redacted]'s memorandum was created, edited, and saved and who was responsible for these activities. She claims that this information is relevant to whether Mr. [redacted] was truthful when he claimed that he confirmed that the conditions of the [redacted] program were met. Ms. [redacted] contends,

further, that this is relevant to whether Mr. [redacted] or Ms. [redacted] had a motive to retaliate against her for her attempted audit disclosures.

The OIG argues that after Mr. [redacted] wrote his memorandum to the file regarding his interview of [redacted], Ms. [redacted] "electronically signed off on Mr. [redacted]'s memo, and never came back to him to express disagreement." The OIG contends that Ms. [redacted] did not challenge Mr. [redacted]'s findings or [redacted] analysis and she did not include her concerns in the drafts of the audit report that she submitted in TeamMate. USAID OIG argues that at best, the issue of Ms. [redacted]' audit concerns amount to no more than a policy disagreement that does not amount to a protected whistleblower disclosure.

RULING on Request #5:

The Board denies this request on the ground that it appears to be an additional attempt to ascertain the veracity of Mr. [redacted]'s statements during his deposition. As stated before, this is not within the scope of our order allowing discovery to be reopened.

Request #6: Deposition of [redacted]

Ms. [redacted] argues that Ms. McClennon attempted to justify her takeover of the investigation into the vouchers by claiming that there was no other investigator in the country at the time, other than [redacted]. Ms. [redacted] contends that Ms. McClennon testified in her deposition inconsistently when she acknowledged that [redacted] another OIG investigator in [redacted], assisted her with the investigation. Ms. [redacted] argues that she did not learn of [redacted]'s involvement in the investigation until Ms. McClennon's May 18, 2014, deposition. She argues that by that time, the Board had "limited" the retaliation defense."

USAID OIG argues that there is no evidence that [redacted] had any substantive involvement in Ms. McClennon's expanded investigation other than the single task of

confirming what extracurricular activities were offered at Ms. [redacted]' children's school.[9] Generally, the OIG contends that Ms. [redacted] does not establish that any of the additional discovery was unavailable to her during the regular course of discovery in this case.

RULING on Request #6:

We deny this request. The record of proceedings already contains a declaration by [redacted] explaining her limited involvement in the investigation conducted by Lisa McClennon. No more is required.

B. MOTION TO COMPEL DISCOVERY

In the two depositions conducted in June 2015, Messrs. [redacted] and [redacted], on the advice of OIG counsel, refused to answer any questions that might have identified the source of the initial complaint against Ms. [redacted]. The charged employee asserts she is entitled to know who that source was in order to prove that her protected whistleblower disclosures were a contributing factor in the informant's decision to make the complaint that prompted the investigation and that resulted in the recommendation to separate her.

The Agency claims that section 7(b) of the Inspector General Act (IGA) precludes the IG from disclosing information about the identity of any employee who has filed a complaint or information without the consent of the employee, "unless the IG determines such disclosure is unavoidable during the course of the investigation." 5 USC 7(b).

The Board weighed the OIG's assertion that the IGA is an absolute and complete bar to disclosure of the identity of the complainant in this case against the charged employee's asserted need to learn the identity of the source of the complaint that caused her to be investigated. The Board acknowledges the conflict between the charged employee's desire to prove her

[9] This was relevant to Ms. [redacted]' submission of vouchers for transportation of the children to extracurricular activities that were not sponsored by the school, that were not on the school's campus, and that occurred on days when the school was closed.

whistleblower retaliation claim (by attempting to establish that she made protected disclosures that contributed to the reasons for the investigation-triggering complaint), and the OIG's significant need to protect the identities of its sources under the IGA.[10]

In whistleblower retaliation defense cases, the law requires the agency to first prove that the challenged personnel action is justified. The charged employee must then prove by preponderant evidence that (1) she made a protected disclosure and (2) the disclosure was a contributing factor in the personnel action. 5 USC 1221(e).[11] The Board recognizes that discovery of program violations made during routine audits can comprise protected whistleblower disclosures. *Askew v. Dept. of Army*, 88 MSPR 674 (2001) (Disclosure of accounting rule violations may be whistleblowing even if the discovery occurred during the employee's normal duties); *Garrett v. DOD*, 62 MSPR 666 (1994) (An employee's report to a supervisor that a contractor had overcharged the government was a protected disclosure, even if it was discovered during the employee's duties as an auditor).

We also recognize that although the Acting IG who recommended the separation action in this case testified that he did not have any knowledge of the employee's alleged protected

[10] In our analysis, we conclude that the source of the complaint against Ms. [redacted] could reasonably be assumed to be him or herself a whistleblower, and thus also protected under the Whistleblower Protection Act, in addition to the IGA. 5 USC 2302(b)(8).

[11] 5 USC 1221(e) provides:

> (1) … in any case involving an alleged [whistleblower retaliation] … the Board shall order such corrective action as the Board considers appropriate if the employee … has demonstrated that a disclosure or protected activity described under section 2302(b)(8) … was a contributing factor in the personnel action which was taken …. The employee may demonstrate that the disclosure or protected activity was a contributing factor in the personnel action through circumstantial evidence, such as evidence that—
>
> **(A)** the official taking the personnel action knew of the disclosure or protected activity; and
>
> **(B)** the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure or protected activity was a contributing factor in the personnel action.
>
> **(**2**)** Corrective action under paragraph (1) may not be ordered if, after a finding that a protected disclosure was a contributing factor, the agency demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure.

audit disclosures, he concedes that his discipline recommendation was directly influenced by the results of the investigation. This, then, requires an examination into how the investigation began. *Whitmore v. DOL*, 680 F.3d 1353, 1371-72 (Fed. Cir. 2012):

> Since direct evidence of a proposing or deciding official's retaliatory motive is typically unavailable (because such motive is almost always denied), federal employees are entitled to rely on circumstantial evidence to prove a motive to retaliate. … Thus … the Board will consider any motive to retaliate on the part of the agency official who ordered the action, as well as any motive to retaliate on the part of other agency officials who influenced the decision.
>
> [The employee] is at a particularly severe evidentiary disadvantage when it comes to proving the state of mind of [agency] officials if a mere denial is sufficient to remove the possibility of retaliatory motive. … [The employee] also has no control over the identity of the proposing and deciding officials or what documentation is created or maintained, whereas the agency can direct the course of an investigation and advantageously select officials several degrees removed from the whistleblower to help the agency's case withstand judicial scrutiny.

The question presents itself whether Ms. [redacted] alleged protected disclosures contributed in any way to the initiation of the investigation. This, in turn, requires an examination of the knowledge of the informant whose complaint triggered the investigation. *Russell v. DOJ*, 76 MSPR 317 (1997):

> When … an investigation is so closely related to the personnel action that it could have been a pretext for gathering evidence to retaliation, and the agency does not show by clear and convincing evidence that the evidence would have been gathered absent the protected disclosure, then the appellant will prevail on his affirmative defense of retaliation for whistleblowing. That the investigation itself is conducted in a fair and impartial manner or that certain acts of misconduct are discovered during the investigation, does not relieve an agency of its obligation to demonstrate by clear and convincing evidence that it would have taken the same personnel action in the absence of the protected disclosure.

In order for Ms. [redacted] to prove her claim that the investigation into her financial affairs was pretext for whistleblower retaliation, she has a compelling need to learn what knowledge the informant had when he or she reported her to the OIG.

Having weighed the competing interests, and appreciating the dictates of the competing statutes, the Board issues the following ruling:

The agency shall disclose to the Board, *in camera*, answers to the following questions:

1. Is the source of the June 9, 2011 complaint about [redacted] someone whose identity is known to the agency? That is, was the source of the complaint anonymous or confidential?

2. If the source is an individual whose identity is known, did the source have knowledge of Ms. [redacted]' efforts to make negative audit findings in the [redacted] HIV/AIDs program and/or the [redacted] Family Planning/Contraceptives program (the "alleged protected audit disclosures")?

3. If the answer to question 2 above is unknown, the OIG is ordered to communicate with the source (if known) and inquire whether he/she had knowledge of the alleged protected audit disclosures.

4. If the source had knowledge of the alleged protected disclosures, the OIG is further ordered inquire of the source whether he or she will consent to disclosure of his/her identity to Ms. [redacted] for the purpose of enabling her attempt to prove a whistleblower retaliation defense.

IV. ORDER

Additional discovery request #1 in the charged employee's June 30, 2015, Motion for Additional Discovery is granted. USAID/OIG shall produce the investigation files of both Mr. [redacted] and Ms. Lisa McClennon within five days of receipt of this order. Additional discovery request #3 is denied, but [redacted] shall submit a declaration describing his involvement in the investigation within five days of receipt of this order. In all other respects, the Motion for Additional Discovery is denied.

With respect to the August 3, 2015, Motion to Compel Discovery, the motion is granted in part. USAID OIG is ordered to submit for *in camera* review by the Board written answers to the questions posed in section III above within five days of receipt of this order.

For the Foreign Service Grievance Board:

[redacted]

Susan R. Winfield
Presiding Member

[redacted]

William Hudson
Member

[redacted]

Nancy M. Serpa
Member